AETNA UNIVERSAL INSURANCE SDN BHD

v.

FIRE ACCIDENT & MARINE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[CIVIL SUIT NO: D7(D2)-22-252-1991]
26 JULY 2001

CIVIL PROCEDURE: *Admission - Judgment on admission of facts - Whether pleadings showed clear admission of indebtedness - Counterclaim - Set-off - Rules of the High Court 1980, O. 27 r. 3*

CIVIL PROCEDURE: *Judgment - Admission - Judgment on admission of facts - Whether pleadings showed clear admission of indebtedness - Rules of the High Court 1980, O. 27 r. 3*

The plaintiff, an insurance company, had sought RM748,000 in respect of premiums allegedly received by the defendant in its capacity as the plaintiff's underwriting agent. The plaintiff also prayed for a restrictive injunction to prevent the defendant from further representing or holding itself out as an underwriting agent of the plaintiff, and a mandatory injunction to deposit forthwith with the plaintiff's solicitors all documents relating to the plaintiff's insurance business held by the defendant. The defendant counterclaimed for the sum of RM654,832.66 in respect of purportedly unpaid commissions and incentive allowances, and an injunction to restrain the plaintiff from cancelling contracts of insurance issued by the defendant. Founded on a clear admission of indebtedness by the defendant, the plaintiff successfully obtained judgment on admission of facts pursuant to O. 27 r. 3 of the Rules of the High Court 1980. The defendant appealed.

Held:

[1] The pleadings and affidavits showed a clear, consistent and unequivocal admission by the defendant of its indebtedness to the plaintiff in respect of the plaintiff's claim. The defendant by its own admission had unwittingly agreed that the trial would only pivot on whether the sum specified as a set-off in its counterclaim could be legally deducted from the sum admittedly owed to the plaintiff. The senior assistant registrar was thus justified in granting judgment in favour of the

plaintiff and his finding was not perverse to the intention of the rules, *ie*, to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. (pp 759 g-760 b)

[Appeal dismissed with costs.]

Case(s) referred to:

Pembinaan KSY Sdn Bhd v. Syarikat Federal Furniture Construction and Engineering Works [1991] 1 CLJ 678; [1991] 1 CLJ (Rep) 346 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 2(4), O. 18 r. 17, O. 27 r. 3

Other source(s) referred to:

Malaysian Court Practice, High Court, Issue O, pp 1276-1277

The Supreme Court Practice, 1996 reprint of 1979 edn, vol 1, paras 27/3/4-5

For the defendant/appellant - Balvinder Singh Kenth; M/s Sri Ram & Co

For the plaintiff/respondent - Prasad Abraham (Woon Fei Hong); M/s Prasad Abraham & Assoc

Reported by K Ganesh

JUDGMENT

T Selventhiranathan J:

Facts And Application

The plaintiff instituted this action claiming against the defendant the sum of RM748,000 in respect of premiums which the defendant had allegedly received in its capacity as the underwriting agent of the plaintiff in respect of various types of non-life and general insurance business ("the business") of the plaintiff for the period from 3 October 1989 to 2 October 1990. As the plaintiff was dissatisfied with the performance of, and the services provided by, the defendant in relation to the business, the plaintiff informed the defendant on 30 October 1990 that it would not renew the underwriting status of the defendant with effect from 1 January 1991 and it further demanded from the defendant the return of all the plaintiff's motor and non-motor insurance cover notes, unissued policies and stationery by 31 December 1990, to which demand there was added subsequently a demand for the return of the plaintiff's insurance proposal forms for the various insurance policies set out in a letter dated 17 December 1990.

On 21 December 1990 the plaintiff also demanded the payment of all premiums due and payable by the defendant for non-motor insurance amounting to RM748,000.

As the defendant failed, refused and/or neglected to return all the plaintiff's insurance cover notes, unissued policies, proposal forms and stationery and further failed, refused and/or neglected to pay the outstanding premiums due and payable to the plaintiff, the latter sought the following reliefs through this action:

(a) judgment for the sum of RM748,000;

(b) an injunction to restrain the defendant, its agents, servants, directors or sub-agents from issuing any cover notes for any risk either in motor or non-motor insurance to any members of the public or to represent or hold out itself as an underwriting agent of the plaintiff for any insurance business whatsoever;

(c) a mandatory injunction to compel the defendant to forthwith deposit with the plaintiff's solicitors all the plaintiff's insurance cover notes for motor and non-motor insurance, the plaintiff's unissued insurance policies, the plaintiff's proposal forms, whether complete or incomplete, and the plaintiff's stationery, whether used or unused; and

(d) the costs of this action.

On 19 April 1991, the defendant filed its defence and counterclaim wherein it contended that pursuant to the underwriting-agency agreement ("the agreement") entered into between itself and the plaintiff, the plaintiff was required to pay the defendant commissions, overriding commissions and management-incentive allowances in respect of business procured by the defendant on behalf of the plaintiff and for services rendered to the plaintiff. However, the plaintiff had failed to pay the overriding commissions and management-incentive allowances amounting to a sum of RM654,832.66. In the circumstances the defendant counterclaimed for:

(a) an injunction restraining the plaintiff from cancelling the contracts of insurance issued by the defendant on behalf of the plaintiff on the ground the premiums had not been received by the plaintiff;

(b) the sum of RM654,832.66;

(c) general and special damages for breach of the agreement;

(d) costs; and

(e) such other and further relief the court may deem fit.

The plaintiff in its reply and defence to the counterclaim denied entering into any agreement with the defendant, orally or in writing, to pay the overriding commissions or management-incentive allowances as alleged and joined issue with the defendant on all relevant matters raised in the defence and counterclaim.

On 24 November 1998, the plaintiff filed an application *vide* encl. (43), ("the application" or "this application"), pursuant to O. 27 r. 3 of the Rules of the High Court 1980, to enter judgment for the plaintiff in terms of the first prayer in the statement of claim, ie, for the sum of RM748,000, upon an admission of fact by the defendant. The basis of the application was that the defendant itself had admitted such fact in an affidavit (encl. (10)) affirmed on 12 April 1991 by one Yap Kim Chui, a director and shareholder of the defendant.

(Any reference to an Order or a rule hereinafter shall mean that Order or rule as the same appears in the Rules of the High Court 1980).

The affidavit of the plaintiff at encl. (42) in support of the application was affirmed by one Quah Seng Lee, the claims manager of the plaintiff. In this affidavit the deponent adverted to another affidavit of the plaintiff at encl. (2), which had been affirmed by one Kamal Abdullah on 20 February 1991, and to the first affidavit of the defendant at encl. (10) affirmed by the said Yap Kim Chui on 12 April 1991.

By para. 4 of encl. (42), Quah Seng Lee averred that it was clear from the first affidavit of the defendant that the latter did not dispute the plaintiff's claim for the specified sum of RM748,000 as owing but contended that it had a counterclaim against the plaintiff.

Kamal Abdullah had, in paras. 39 to 41 of encl. (2) stated as follows:

39. Besides the claim for the return of the unused cover (notes, the) plaintiff is also suing the defendant for non-payment of premiums due to the plaintiff company.

40. On 23 January 1991, the plaintiff demanded from the defendant the payment of these premiums. A copy of the letter is annexed hereto and marked 'KA20'.

41. The total amount due to the plaintiff from the defendant is a sum of RM764,829.26.

In response to these averments on behalf of the plaintiff, Yap Kim Chui had answered as follows in para. 7.30 and sub-para. 7.30.1 of encl. (10):

> 7.30 In answer to paragraphs 39, 40 and 41 of the said affidavit under reply I respectfully state as follows:
>
> > 7.30.1 the defendant has never denied its indebtedness to the plaintiff but only claimed a right of set-off which it was entitled to in law and in fact;.

Quah Seng Lee averred in para. 5 of encl. (42) that as the statement above of Yap Kim Chui was a clear admission of the indebtedness of the defendant to the plaintiff to the extent of RM764,829.26, the plaintiff prayed that judgment be entered in its favour for the reduced sum of RM748,000 in the circumstances and that other issues, if any, proceed to trial.

The defendant replied to Quah Seng Lee's affidavit at encl. (42) through the affidavit of its adviser, one Liew Hoong, at encl. (44). Besides raising the issue of delay since 1991 on the part of the plaintiff in making this application, Liew Hoong asserted that there had been no clear admission of debt by the defendant as the sum of RM764,829.26 stated in Kamal Abdullah's affidavit at para. 41 of encl. (2) differed from the amount of RM748,000 claimed by the plaintiff in its statement of claim. He went on to say that "even if the plaintiff's application is dismissed, the trial to be carried out will focus on the defendant's counterclaim and on the issue of whether the defendant is legally entitled to set-off *(sic)* against the plaintiff's claim. The issue can only be decided upon by (a) full trial of this action" (at para. 8 of encl. (44)).

To this, the plaintiff responded through the affidavit of Quah Seng Lee at encl. (45) to the effect that the delay by the plaintiff in making its application could not become an obstacle to making a *bona fide* application under O. 27 r. 3. Furthermore, the court had a discretion in appropriate circumstances to order a stay of the judgment sought until the counterclaim of the defendant had been heard and disposed of. In reply to para. 7 of the defendant's affidavit at encl. (44), Quah Seng Lee averred that although the defendant had made a clear admission of indebtedness to the plaintiff in excess of the plaintiff's claim, the plaintiff was prepared to forego claiming the amount in excess and would be content with judgment being entered for the lesser amount claimed, although it was in a position to apply to amend the pleadings to claim the full amount of the admitted debt.

Transfer Of File, Decision By Registrar And Appeal

The file of this action which was originally registered with High Court D2 in the Commercial Division of the High Court in Malaya at Kuala Lumpur was subsequently dealt with by High Court D6, and was finally transferred to my court, High Court D7, sometime in 1999.

The senior assistant registrar ("the registrar") of High Court D7 eventually heard the application and granted an order in terms thereof in favour of the plaintiff. Being dissatisfied with that decision, the defendant appealed to me sitting as judge in chambers *vide* encl. (47).

Arguments On Appeal

The parties put in written submissions in respect of the hearing of the appeal in encl. (47) before me and elaborated further thereon.

The learned counsel for the plaintiff, Encik Prasad Abraham, submitted that the essence of the defendant's counterclaim, which was framed in the nature of a set-off, was not pleaded as a set-off in the defence. Order 18 r. 17 provided the defendant with the option to include its claim in the defence and set it off against the plaintiff's claim or to add it as a counterclaim. Since the defendant chose to do it by way of a counterclaim, the admission of the debt by the defendant therefore became that much stronger because it disposed of the issue as far as the plaintiff was concerned. In his view, the question of the admission being intertwined with the issue of the counterclaim and the fact that this might complicate the prosecution of the counterclaim did not arise because the plaintiff had agreed to a stay of the judgment debt until the counterclaim was disposed of. The element of prejudice under O. 15 r. 2(4) did not arise in these circumstances.

The learned counsel for the defendant, Encik Balvinder Singh Kenth, submitted that if the defence was taken in totality, it was pleaded as a set-off. It was his argument that the claim and counterclaim were indeed intertwined as the plaintiff would have to establish the quantum of its claim first, against which the defendant would seek to establish the overriding commissions due to it.

On the contention on behalf of the plaintiff that the defendant would not be prejudiced if judgment was entered on the claim because the plaintiff would agree to its stay pending the disposal of the counterclaim, the learned counsel for the defendant submitted that the court, having entered judgment for the plaintiff at this stage for a specific sum, would certainly bar the defendant from challenging that quantum at the trial of the counterclaim and therein lay the prejudice to the defendant.

Decision On Appeal

Having read as well as heard the submissions of the learned counsel for the parties and having read the grounds of decision of the registrar, I was in agreement with the submissions of counsel for the plaintiff and the reasons of the registrar in arriving at his decision. In the circumstances, I upheld his decision and dismissed the appeal in encl. (47) with costs. However, I directed, as agreed, that the stay on the execution of the judgment be maintained until the hearing and disposal of the counterclaim.

I now give my reasons for dismissing the appeal of the defendant and confirming the decision of the registrar.

It was clear from the pleadings and the affidavits referred to earlier in this judgment that the defendant did not deny the claim of the plaintiff but alleged instead that it had a defence and counterclaim against the plaintiff in the nature of a set-off. The plaintiff's averment of fact at para. 41 of encl. (2) that:

> The total amount due to the plaintiff from the defendant is a sum of RM764,829.26.

was met with the following response on behalf of the defendant at para. 7.30 and sub-para. 7.30.1 of encl. (10):

> 7.30 **In answer to paragraphs 39, 40 and 41** of the said affidavit under reply (ie, enclosure (2)) I respectfully state as follows:
>
> 7.30.1: **The defendant has never denied its indebtedness to the plaintiff** but only claimed a right of set-off ... . (emphasis added)

To my mind this was a clear and unequivocal admission by the defendant of its indebtedness to the plaintiff in respect of the claim.

I agreed with the written submissions of the learned counsel for the plaintiff that the defendant had been consistent in its admission of indebtedness to the plaintiff as could be seen from the defendant's affidavit in reply at encl. (44) in respect of the application where the defendant had never really denied that the sum of RM764,829.26 was owing by the defendant to the plaintiff but in fact had gone further to admit the claim of the plaintiff by deposing in para. 8 of that affidavit as follows:

> ... even if the plaintiff's application herein is dismissed, **the trial to be carried out will focus on the defendant's counterclaim and on the issue of whether the defendant is legally entitled to set-off *(sic)* against the plaintiff's claim.** (emphasis added)

To my mind, the only matter to be determined at the trial of the defendant's counterclaim, according to the defendant itself, would be whether the sum of RM654,832.66 it specified as being a set-off in its counterclaim could be legally deducted as such from the sum of RM764,829.26 which it had clearly and unequivocally admitted as owing to the plaintiff. Authority for so holding can be found in para. 27/3/4 of *The Supreme Court Practice*, Malaysian edition, 1996 reprint of 1979 edition, vol. 1 which states:

> ... Where the defendant admits a claim but pleads a counterclaim the plaintiff may obtain leave to sign judgment on the terms that the money is to be paid into court, or that there is a stay of execution pending the trial, or it may be refused according to circumstances (see *Showell v. Bouron* [1883] 52 LJQB 284; *Mersey, etc Co v. Shuttleworth* [1883] 11 QBD 531).

On the issue of admissions of fact under O. 27 r. 3, it cannot be gainsaid that such admissions can be made in the form of an affidavit. Even a failure to deny an allegation of fact in an affidavit can be held to be sufficient admission of that fact for the purposes of O. 27 r. 3 as is clear from the following passage at para. 27/3/5 of *The Supreme Court Practice (supra)*:

> In *Freeman v. Cox* 8 Ch D 148 failure to deny an allegation in the plaintiff's affidavit that the money was in defendant's hands was held sufficient; and see *Re Beeny* [1894] 1 Ch 499. But this does not establish the proposition that in all cases a mere failure to deny statements in plaintiff's affidavit is a binding admission on which to found an order for payment (see *Hollis v. Burton* [1892] 3 Ch 226).

Useful reference may also be made to the following passages in the *Malaysian Court Practice, High Court, Issue O* at pp. 1276 and 1277 in relation to O. 27 r. 3:

> **3 Judgment on admission of facts**
>
> Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

(27.3.1) Scope of the rule

Where a party to a cause or matter has made admissions either under O. 27 r. 1 (admission of case of other party) or r. 2 (notice to admit fact), the party in receipt of the admissions may apply to court for such judgment or order as he may be entitled to on the admissions, without waiting for any other question between them to be tried. The object of the rule is to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed: *Ellis v. Allen* [1914] 1 Ch 904 at 909.

(27.3.2) Where admissions of fact are made

Admissions of fact may be expressed or implied but they must be clear: *Ong Gim Huat v. Toh Suan Lin Amy* [1992] 2 MLJ 610 at 614. Further, the admission must be a clear admission of all, and not simple evidence of some of the facts upon which the plaintiff would have to rely to establish his cause of action: *Carabao Exports Pty Ltd v. Online Management Consultants Sdn Bhd and Others* [1988] 3 MLJ 271 at 272. Even if the admission fulfills such requirements, but is nevertheless inextricably intertwined with the issues at the trial, then judgment should not be given if it then follows that the basis of the trial will be extinguished: *Ruby Investment (Pte) Ltd v. Candipark Pte Ltd* [1989] 3 MLJ 396 at 400. ...

(27.3.4) Either by his pleading or otherwise

The admissions in the pleadings may be made expressly in a defence or in a defence to a counterclaim. They may also be deemed admissions by virtue of the rules where, for example, a defendant fails to traverse an allegation of fact in his pleading (see O. 18 r. 13 (admissions and denials)) or, there is a default of defence (see O. 19 rr. 2-7), or a defence is struck out under O. 18 r. 19 (striking out pleadings and indorsements). A person under disability, however, shall not be taken to admit the truth of any allegation by reason only that he has not traversed it in his pleadings (see O. 76 r. 8, admission not to be implied from pleading of person under disability).

The words 'or otherwise' are not confined to admissions made under r. 1 or r. 4 of O. 27, but are of general application, and justify the making or giving of an immediate order or judgment where, for example, an admission is made by letter: *Pembinaan KSY Sdn Bhd v. Syarikat Federal Furniture Construction and Engineering Works* [1991] 1 CLJ 678, or an admission made by letter of facts which show that the defendant has no defence to the action: *Ellis v. Allen* [1914] 1 Ch 904. Money may also be ordered to be paid into court upon an admission by a defendant, even though the admission was made verbally and is not contained in any written document: *Re Beeny, Ffrench v. Sporston* [1894] 1 Ch 499 at 501.

...

(27.3.6) May apply

An application for an order under O. 27 r. 3 may only be made by summons: *Ong Gim Huat v. Toh Suan Lin Amy* [1992] 2 MLJ 610 at 611. **The application is usually heard on the summons for directions, but it may be made at any time.** (emphasis added)

(27.3.7) As upon those admissions he may be entitled to

A plaintiff who relies for the proof of a substantial part of his case upon admissions in the defence must show that the matters in question are clearly pleaded and clearly admitted; he is not entitled to ask the court to read meanings into his pleading which upon a fair construction do not clearly appear in order to fix the defendants with an admission: *Ash and Another v. Hutchinson and Co (Publishers) Ltd and Others* [1936] 1 Ch 489 at 503.

(27.3.9) The court may give such judgment ... as it thinks just

The jurisdiction of the court is always discretionary: *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 157 at 159. For example, the facts that judgment had not been given for the sum admitted to be due in the proceedings under O. 14, that the amount claimed was very much larger than the amount admitted, and that the amount of the claim so far as admitted in the defence had been paid into court, afforded no reason why judgment should not have been given for the plaintiffs under RSC 1965 O. 32 r. 6: *Lancashire Welders Ltd v. Harland and Wolff Ltd* [1950] 2 All ER 1096. It seems therefore that in the absence of reasons to the contrary, the order is made so as to save time and costs.

On the argument for the defendant that the sum admitted was different from the sum claimed in the statement of claim and in encl. (43) and therefore the plaintiff could not obtain judgment based on the admission, the short answer to that was that though the outstanding and admitted sum was RM764,829.25, the plaintiff was prepared to take judgment for the smaller sum of RM748,000 as specified in the statement of claim and this was to the defendant's benefit and certainly not to its detriment or prejudice.

Since the admission by the defendant was on the plaintiff's entire monetary claim, consequently the submissions on the defendant's behalf that this admission was inextricably intertwined with the issues for trial on the counterclaim could not be sustained.

In *Pembinaan KSY Sdn Bhd v. Syarikat Federal Furniture Construction and Engineering Works* [1991] 1 MLJ 347 the headnotes show that the respondents therein (who were the plaintiffs at first instance) were appointed as subcontractors by the appellants to manufacture furniture for

a hotel in Kuala Lumpur which was under construction. The respondents claimed that they had completed a certain portion of the works for which the architect concerned had issued certificates of interim payments. The appellants therein (who were the defendants at first instance) in their defence had claimed that the certificates had been superseded by another interim certificate issued by the architect. The respondents applied for judgment based on a letter by the appellants addressed to the owners of the hotel building admitting the claim of the respondent under the three certificates. The learned senior assistant registrar dismissed the claim of the respondents but on appeal the learned judge of the High Court reversed the decision of the senior assistant registrar and ordered judgment for the sum claimed in favour of the respondents. He also dismissed the counterclaim of the appellants. The appellants appealed.

The then Supreme Court dismissed the appeal and held that on the evidence before the learned judge it could not be said that he had come to any perverse finding and the court agreed that the respondents were entitled to judgment under O. 27 r. 3. However, it went on to hold that the counterclaim of the appellants ought not to have been dismissed out of hand merely on affidavit evidence and that it should go for trial.

In narrating the facts in that case, the late Ajaib Singh SCJ (as he then was) stated as follows at p. 348 of the report of that case:

> On 2 July 1987 the plaintiffs/respondents applied for judgment under O. 27 r. 3 of the Rules of the High Court 1980 based on a letter dated 3 July 1986 by the defendants/appellants addressed to Lian Seng Properties Sdn Bhd – the owners of the building – admitting the plaintiffs'/ respondents' claim under the three certificates Nos 29, 30 and 31. Earlier by teller dated 27 June 1986 the plaintiffs/respondents had complained to Messrs Lian Seng Properties Sdn Bhd that the defendants/appellants had failed to pay the sums mentioned in the three certificates:
>
> > The contractor, Messrs Pembinaan KSY Sdn Bhd, have *(sic)* failed to pay us the sums in respect of the work executed by us and certified in the architect's certificates Nos 29, 30 and 31 of sums (of) $139,500, $241,850 and $187,400 respectively. These payments are more than five months overdue.
>
> A copy of this letter was sent to Pembinaan KSY Sdn Bhd – the defendants/ appellants. It was in response to this letter that the defendants/appellants wrote to Messrs Lian Seng Properties Sdn Bhd on 4 July 1986 referring to the letter of the plaintiffs/respondents dated 27 June 1986. In this letter of 4 July 1986 to Lian Seng Properties Sdn Bhd the defendants/appellants said:

> We refer to Messrs Federal Furniture's AR registered letter dated 27 June 1986 addressed to you and a copy extended to us and which contents are pertaining to their application for direct payments from you for the amount due under the various architect's certificates of payment Nos 29, 30 and 31. We wish to put on record that our inability to pay the outstanding payments to the nominated subcontractor is as a result of your failure to honour the progress payments certificates duly.

It was based on this letter of 4 July 1986 by the defendants/appellants to Lian Seng Properties Sdn Bhd that the plaintiffs/respondents applied for judgment under O. 27 r. 3.

He then went on to hold as follows at p. 349 of the report of that case:

> On the evidence before the learned judge it cannot be said that he had come to any perverse finding and we agree with him that the plaintiffs/respondents are entitled to judgment under O. 27 r. 3 of the Rules of the High Court 1980. However we are of the view that the defendants'/appellants' counterclaim ought not to have been dismissed out of hand merely on affidavit evidence. Their counterclaim should go for trial. We accordingly dismiss with costs here and below the appeal against the decision of the learned judge against the defendants/appellants for the plaintiffs'/respondents' claim of $568,750 and $67,958.61 as interest and direct that the counterclaim be heard on its merits.

It was with respect that I adopted the reasoning of the then Supreme Court in *Pembinaan KSY Sdn Bhd (supra)* by which authority I was bound by the operation of the principle of *stare decisis*, and accordingly dismissed with costs the appeal of the defendant in encl. (47), thereby only leaving for proof at trial the defendant's alleged counterclaim and set-off. At the same time I directed that the stay on the execution of the judgment, which had been agreed upon by the parties before the registrar, be maintained. In view thereof, the delay on the part of the plaintiff in making the application was not material as the defendant was not prejudiced thereby.